901 CAUSE

The _____ element requires that the defendant caused (identify harm or consequence) to (name of victim). "Cause" means that the defendant's conduct was a substantial factor in producing (identify harm or consequence).

FOR CASES WHERE THERE IS EVIDENCE OF MORE THAN ONE CAUSE, ADD THE FOLLOWING:

[There may be more than one cause of (identify harm or consequence). The act of one person alone might produce it, or the acts of two more persons might jointly produce it.]

COMMENT

Wis JI-Criminal 901 was originally published in 1996 and the Comment was updated in 2004, and 2016. This revision was approved by the Committee in October 2021; it added to the comment.

This instruction is intended to provide a basic definition of "cause." Its substance is incorporated into most instructions for substantive offenses. That typically involves a relatively brief statement, which may be inadequate in a case where a contested or difficult cause issue is presented. The material provided here may be helpful for the preparation of a more detailed cause instruction in those cases.

Cause In Wisconsin: "Substantial Factor"

Wisconsin has no statutory definition of cause; through case law it has adopted the "substantial factor" test. The same standard is used in civil cases – see Wis JI-Civil 1500 and 1505.

Even the comprehensive Wisconsin Criminal Code Revision in the 1950's did not define "cause." But the state of the law at the time was summarized in the commentary to a general section on homicide – sec. 340.01 of the 1950 draft – that was not enacted:

> *Causation:* In criminal law, as in torts, the term causation is used to refer to 2 quite different problems: (a) Did the actor's act in fact cause the consequences, and, (b) assuming that it did, is there any reason based on policy considerations for limiting liability?

> Whether the actor's act did in fact cause the prescribed consequence is, in the ordinary case, not difficult to determine. The state has the burden of proving this element to the jury. The "substantial factor" test currently in use in tort litigation works equally well in criminal law.
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> Whether there is any reason based on policy considerations for limiting liability may be more difficult to determine. Part of this difficulty is attributable to the fact that the problem is often treated as one of causation rather than one of limiting liability based on policy considerations present in the particular case. . .
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> **Wisconsin Legislative Council 1950 Report Vol. VII – Judiciary – Part III**
> **April 1951, p. 50**

For a case finding the evidence insufficient to prove that a defendant's conduct caused death, see State v. Serebin, 119 Wis. 2d 837, 350 N.W.2d 65 (1984).

In State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, the court held that the "substantial factor" test was met as to reckless homicide and physical abuse of a child and affirmed the trial court's refusal to give an instruction on "intervening cause."

Several cases have addressed the definition of "substantial factor." In the context of felony murder, the Wisconsin Supreme Court has held that a "'substantial factor' need not be the sole cause of death." See State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). In State v. Owen, 202 Wis.2d 620, 631, 551 N.W.2d 50, (Ct. App. 1996), the court concluded, "A substantial factor need not be the sole or primary factor causing the great bodily harm."

In State v. Miller, 231 Wis.2d 447, 457, 605 N.W.2d 567 (1999) the court determined that the Oimen and Owen holdings are not inconsistent with each other. The Miller court noted, "Both cases use a definite article in explaining that a substantial factor need not be limited to one sole or primary cause" . . . "[O]ur reading of Oimen and Owen convinces us that a substantial factor contemplates not only the immediate or primary cause, but other significant factors that lead to the ultimate result." Id. At 457.

In Burrage v. United States, 571 U.S. 204, 134 S.Ct. 881 (2014), the U.S. Supreme Court interpreted a federal statute – 21 USC § 844(a)(1), (b)(1)A-C – which provides for a 20-year mandatory minimum sentence where death or great bodily harm results from the use of a controlled substance. The Court held that "results from" means "actual cause" and that "actual cause" means that the harm would not have occurred but-for the defendant's conduct. The Court rejected the government's argument [a position also adopted by several federal circuits] that it was sufficient if the defendant's conduct was a "contributing cause" of the harm. In rejecting that argument, the court referred to [but did not necessarily accept] the government's characterization that "contributing cause" and "substantial factor" cause were the same thing. That reference should have no impact on Wisconsin law because Burrage is a decision interpreting a federal criminal statute and is not binding in Wisconsin. Further, the Wisconsin "substantial factor" test requires "actual" or "physical" cause [and thus would satisfy the concerns addressed in Burrage if that decision did apply].

Intervening Medical Treatment

The issue of intervening medical treatment and cause of death was discussed in State v. Block, 170 Wis.2d 676, 489 N.W.2d 715 (Ct. App. 1992). Block was convicted of second degree murder in connection with the death of his 73-year-old grandmother, whom he stabbed on October 5, 1987. Between the day of

the stabbing and the day of death on December 24, 1987, the victim was hospitalized three times and underwent three operations. She died from a pulmonary embolism. The treating physicians testified that the stabbing was a substantial factor in causing her death.

Block claimed that negligence by the treating physicians caused the death. Over Block's objection, the trial court instructed the jury as follows:

> In Wisconsin, if the defendant inflicts a wound of potentially mortal or life threatening nature on another and negligence, if any, of the doctor contributes to the victim's death, such negligence does not break the chain of causation between the acts of the defendant and the subsequent death. The State is only required to prove beyond a reasonable doubt that the defendant's acts were a substantial factor in producing the death.

The court of appeals held that the instruction was warranted by the evidence and also accurately stated the law:

> . . . any medical negligence in connection with procedures undertaken in response to a life-threatening situation created by the defendant does "not break the chain of causation" even though that negligence may have "contributed" to the victim's death.

170 Wis.2d 676, 682, citing Cranmore v. State, 85 Wis.2d 722, 271 N.W.2d 402 (Ct. App. 1978).

Also see, State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, which involved the termination of life support measures for a child victim injured by the defendant's actions.

"As a Result" Means "Cause"

Some criminal statutes, primarily outside the Criminal Code, use a phrase like "as a result" or "results in" where one might expect to see the word "cause" used. These phrases mean the same thing as "cause" and should be defined in terms of "substantial factor." State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989) and State v. Wille, 2007 WI App 27, 299 Wis.2d 531, 798 N.W.2d 343. See, for example, § 346.17 [Wis JI-Criminal 2630] and § 125.075 [Wis JI-Criminal 5050].

The "Year And A Day" Rule

In State v. Picotte, 2003 WI 42, 261 Wis.2d 249, 661 N.W.2d 381, the court held that the common law year and a day rule had been the law in Wisconsin since statehood. That rule provided that a prosecution for homicide was barred if death occurred more than one year and one day after the act which caused the death. The court exercised its authority to abrogate the rule, finding that it was archaic and no longer made sense. The court further held that "purely prospective abrogation of the year-and-a-day rule best serves the interest of justice. Thus, prosecutions for murder in which the conduct inflicting the death occurs after the date of this decision are permissible regardless of whether the victim dies more than a year and a day after the infliction of the fatal injury." 2003 WI 42, ¶5. The date of the Picotte decision was May 16, 2003.